EDITOR'S NOTE

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87-1317

NO. ____________

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

[redacted]

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
et al,

PETITIONERS,

V.

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR;
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

APPENDIX A

JUDGMENT AND TEXT OF OPINIONS OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4106

D.C. Docket No. CV-86-0924-L

STATE OF LOUISIANA ex. rel.
WILLIAM J. GUSTE, JR., Attorney
General,

Plaintiff-Appellant,

and

CASHCO OIL CO., ET AL.,

Intervenors-Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Western District of Louisiana

Before REAVLEY, WILLIAMS and HIGGINBOTHAM,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant and intervenors-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 25, 1987

ISSUED AS MANDATE:

STATE OF LOUISIANA ex rel.
William J. GUSTE, Jr., Attorney General
Plaintiff-Appellant,

and

Cashco Oil Co., et al.,
Intervenors-Appellants,

v.

UNITED STATES of America, et al.,
Defendants-Appellees,

No. 87-4106.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Louisiana sued the United States and a federal lessee operating on the Outer Continental Shelf for violations of the Outer Continental Shelf Lands Act, 43

U.S.C. § 1331 et seq. (1986), and an alleged policy agreement between Louisiana and the United States. The district court entered summary judgment for the United States and its lessee, 656 F.Supp. 1310. We affirm.

Pursuant to a federal lease, the Samedan Oil Corporation ("Samedan") conducts an offshore drilling operation on federal Outer Continental Shelf ("OCS") territory which borders the Louisiana offshore boundary. The leased federal tract is adjacent to state tracts leased by the Cashco Oil Company, the Seneca Resources Corporation and the Pelto Oil Company (collectively referred to as the "state lessees").

The State of Louisiana sued the United States, the Secretary of the Interior (the "Secretary"), the Director of the Minerals Management Service ("MMS")

(collectively referred to as the "federal defendants") and Samedan seeking declaratory and injunctive relief in connection with Samedan's "imprudent and wasteful spacing, drilling, completion, and production practices" on its federal lease. Louisiana asserted that a common reservoir of natural gas underlay the federal/Louisiana border with 84% of the reserves located on Louisiana territory and 16% on the federal domain and that Samedan was draining state reserves and engaging in wasteful practices with the permission of the federal defendants.

The state raised three causes of action. First, it alleged that the federal defendants have a duty under 43 U.S.C. § 1337(g) (1986) to enter into a unitization agreement[1] with the Governor of Louisiana and sought a temporary restraining order and preliminary and

permanent injunctions limiting Samedan's production. It also sought preliminary and permanent injunctions directing the Secretary to engage in negotiations to achieve unitization with respect to Samedan's lease and a declaratory judgment holding that the Secretary's refusal to unitize violates § 1337(g).

Second, it alleged that the MMS is in violation of a 1975 policy agreement between Louisiana and the MMS and that the MMS is permitting Samedan to operate in violation of this agreement. Louisiana sought the same relief requested in its first cause of action with the exception of the desired declaratory judgment, which differed in that it sought a holding that the MMS was in violation of the policy agreement.

Louisiana's third contention was that Samedan is violating Louisiana's correl-

ative rights by engaging in wasteful production practices and that the federal defendants are in violation of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq., by permitting these practices. It sought a temporary restraining order and preliminary and permanent injunctions limiting the Samedan's production to prevent waste.

The district court granted the state lessees' motion to intervene as plaintiffs and the state lessees adopted the causes of action and relief sought by Louisiana. The court denied Louisiana's motion for a preliminary injunction limiting Samedan's production. The federal defendants and Samedan separately moved for summary judgment and the federal defendants moved to dismiss the section 1337(g) unitization claim under Fed.R.Civ.P. 12(b)(2). The court granted the motions

for summary judgment as to all three causes of action and, after relabeling the 12(b)(2) motion to a motion under 12(b)(6), granted that motion as well.[2] This appeal is taken by Louisiana and the state lessees.

We hold that the Secretary has no duty to unitize under section 1337(g)(3) as amended, that the alleged policy agreement did not create legally enforceable rights and that no evidence is presented that Samedan engaged in wasteful practices. We therefore affirm the judgment below.

I. Unitization Under Section 1337(g) as Amended in 1986

Louisiana contends that section 8(g) of the OCSLA, 43 U.S.C. § 1337(g), as amended in 1986, requires the Secretary to engage in good faith negotiations with the

Governor of Louisiana to achieve unitization of the federal and state tracts upon which Samedan and the state lessees operate. A brief review of the history of section 8(g) is in order.

In 1953, the Submerged Land Act, 43 U.S.C. § 1301 <u>et seq.</u>, was passed giving coastal states the right and power to manage submerged lands adjoining their respective coasts. For most coastal states, including Louisiana, the grant extends seaward for three miles. The enactment of the OCSLA in 1953, 43 U.S.C. § 1331 <u>et seq.</u>, authorized the Secretary of the Interior to issue oil, gas and other mineral leases for the submerged lands of the continental shelf, which begins where the states' jurisdiction ends.

While these statutes established jurisdictional boundaries, they did not

address the issue of drainage. Because oil and gas reserves can straddle the jurisdictional boundary, it is possible for the lessee of one government to drain the reserves located on the other government's territory. Under the common law rule of capture, which we apply to the OCS,[3] the owner of land has the right to capture oil and gas underlying his property, including that which migrates to his property from another's land.

In 1978, Congress amended the OCSLA, adding a new section 8(g), 43 U.S.C. 1337(g),[4] which specifically addressed the administration of federal OCS lands situated between three and six miles offshore (the "8(g) zone"). Section 8(g) essentially established a scheme whereby revenues obtained by a federal lessee operating in the 8(g) zone would be shared in a fair and equitable manner by the

federal government and the coastal state if a determination was made that a common field of oil or gas underlay federal and state territory so as to create a threat of drainage by the federal lessee.[5]

Section 8(g)(1) required that the Secretary provide certain information to the Governor of the affected coastal state at the time that nominations were solicited for the leasing of lands in the 8(g) zone. Section 8(g)(2) provided that the Secretary inform the Governor of potential areas to be leased and that they consult to determine whether these areas may contain common fields of oil or gas. If an area potentially containing a common field was selected for development, the Secretary was required to offer the Governor the opportunity to enter an agreement concerning the disposition of

revenues generated by the federal lessee to permit a fair and equitable division.

Under 8(g)(3) of the 1978 Act, the Governor had 90 days to determine whether to accept the agreement. If the Governor decided to decline the agreement, the Secretary could proceed with the leasing of the area, and under 8(g)(4), the Secretary was required to deposit bonuses, royalties and other revenues attributable to the lease in a separate treasury account until an agreement was reached or a United States District Court determined a fair and equitable disposition of the revenues.

That plan did not work. The Secretary and the governors of coastal states failed to reach agreement, resulting in a balance of $6.1 billion in special treasury accounts by 1986, H.R.Rep. No. 300, 99th Cong., 2d Sess. 547 (1985),

reprinted in 1986 U.S.Code Cong. & Admin.News at 1058. Litigation ensued over the proper allocation of these revenues, but none of these actions were ultimately resolved by the courts.[6] The two sides also failed to agree on the interpretation of § 8(g); the Secretary maintained that the sole purpose of § 8(g) was to compensate for drainage, and the states contended that § 8(g) not only included drainage but also compensation for onshore impacts of OCS development. See State of Texas v. Secretary of the Interior, 580 F.Supp. 1197, 1222 (E.D.Tex.1984).

In 1986, Congress amended the OCSLA to obviate the litigation and disputes and to distribute the impounded revenues in the special Treasury accounts. Comprehensive Omnibus Budget Reconciliation Act of 1985 (Outer Continental Shelf Lands Act

Amendments of 1985), Pub.L.No. 99-272, 100 Stat. 82, 147-51 (1986) ("1986 Amendments"). Louisiana received $572 million on October 1, 1986, together with 27 percent of deposited federal royalties derived from OCS lessees through September 30, 1985 with interest, and $84 million to be paid over a fifteen year period. 1986 Amendments § 8004(b)(1). The acceptance of a payment under this section satisfied and released all state claims against the United States arising under the 1978 version of section 8(g).[7]

The 1986 amendments comprehensively revised section 8(g). The provisions[8] that required the Secretary to offer the Governor of an affected coastal state an opportunity to enter an agreement concerning the disposition of revenues generated from federal lessees, and to deposit these revenues in a separate

Treasury account if no agreement was reached pending a fair and equitable disposition by court adjudication, were abolished. New section 8(g)(2) provides that 27 percent of "all bonuses, rents, and royalties, and all other revenues . . . derived from any lease issued after September 18, 1978" on federal land in the 8(g) zone be transmitted to the coastal state adjoining the federal land.[9] The coastal state receives this 27 percent regardless of whether federal lessees are draining resources from state territory. The remaining 73 percent is transmitted to the United States Treasury. Section 1332, which contains a congressional declaration of policy, was revised to include a new part (4)(B) (the old part (4)(B) was renumbered (4)(C)) which provides that the 27 percent received by states under new section 8(g)(2), "will provide affected

coastal states and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of [OCS] resources."[10]

Section 8(g)(3)[11], which is the focus of this litigation, was amended to provide that the Secretary or the Governor of a coastal state shall notify the other if either determines that a common potentially hydrocarbon-bearing area may underlie the federal and state boundary and that the Secretary shall provide to the Governor notice of current and projected development in the area. Additionally, if the Secretary has, or intends to, lease the area, the Secretary and the Governor may enter into a unitization or other royalty sharing agreement, pursuant to existing law, to share the revenues from production. If no agreement is reached,

the Secretary may proceed with the leasing of the area. If an agreement is reached, the revenue received by the federal government is subject to the 27-73 percent division set forth in section 8(g)(2). The wording of this new section does not require the Secretary to unitize or enter into a royalty sharing agreement with the Governor of an affected state.

Louisiana, however, contends that the amended statute compels the Secretary to enter into a unitization or other royalty sharing agreement. Louisiana argues that the word "may" in the phrase, "the Secretary and the Governor of the coastal State _may_ enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law" (emphasis added), should be read to

require the Secretary to negotiate either a unitization or other royalty sharing agreement. Louisiana views the permissive nature of the word "may" to permit the Secretary to choose the form of agreement but not to allow the Secretary to refuse to enter any agreement.

To reach this conclusion, Louisiana first argues that revenues derived from section 8(g)(2) do not compensate coastal states for drainage but only for onshore economic and environmental damage, and for the costs of development to the state's infrastructure, such as roads and schools. Louisiana then argues that section 8(g)(3) is designed to address the drainage issue, and the meaning of this section, construed in the light of its legislative history, requires the Secretary to negotiate in good faith some form of agreement with the Governor of an

affected coastal state when the possibility of drainage by a federal lessee exists.

We find no merit to Louisiana's construction of section 8(g). Its interpretation is not supported by the congressional purpose which animated the 1986 amendments or by the plain meaning of section 8(g)(3). We decline to address Louisiana's underlying contention that state revenues derived from section 8(g)(2) do not include drainage compensation because our interpretation of section 8(g)(3) makes resolution of that issue unnecessary. Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs, but no statutory consequences are provided in the event of failure -- either to agree or attempt to agree. The states are assured

of substantial compensation by section 8(g)(2).

The 1986 amendments were intended to permanently settle disputes over OCS revenues. Under the 1978 version of section 8(g), the Secretary and the Governors of coastal states were in constant disagreement concerning the fair and equitable disposition of OCS revenues, resulting in a $6.1 billion balance in special treasury accounts. The 27 percent allocation in the 1986 revision of section 8(g)(2) was designed to prevent future litigation on this issue. Senator Johnston, one of the sponsors, made this objective clear:

> [T]he committee legislation settles the entire issue, and <u>thus avoids the inevitable recurrence of future disputes over future 8(g) revenues. . . .</u>

* * * * * *

Although this legislation offers the States considerably less than they sought, we feel it is a fair and equitable resolution. We believe this legislation will end current and future litigation over the 8(g) issue, and by giving the States a small stake in revenues from a small area of the OCS, will actually spur OCS development. 131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985) (emphasis added). This intention was stated by other senators as well.[12]

Congressional desire to eliminate litigation over OCS revenues is clearly reflected by the allocation to the states of 27 percent of all mineral revenues from federal lands, and by the abolition of the provisions requiring the negotiation of revenue sharing agreements and equitable dispositions by court decree of disputed revenues held in treasury escrow

accounts. Louisiana's construction of section 8(g)(3) would emasculate this clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith.

The plain meaning and legislative history of section 8(g)(3) also do not support Louisiana's contention that the Secretary is compelled to enter a revenue sharing agreement. While the notification requirements of section 8(g)(3) are cast in mandatory language,[13] the revenue sharing provision is clearly permissive.[14] This language invests the Secretary with discretion to enter into agreements but does not require him to do so. The legislative history supports this interpretation.[15]

Samedan's liability on this cause of action is dependent upon a finding of liability against the federal defendants. The district court correctly granted the federal defendants' and Samedan's motions for summary judgment.

II. The Policy Agreement

As its second cause of action, Louisiana asserts that Samedan is violating, with the permission of the MMS, a 1975 policy agreement between the United States Geological Survey, the predecessor agency to the MMS, and the Louisiana State Mineral Board and Office of Conservation. This alleged agreement created a 4,000 foot buffer zone along the federal/state boundary (2,000 feet per side), set well spacing requirements within this zone, provided for the exchange of drilling permits for wells authorized within the zone and provided

that the party with the largest share of any unit formed within the zone would have the right to set the unit production rates. Louisiana asserts that this last provision implicitly incorporates a duty on behalf of the Secretary to negotiate unitization agreements in good faith.

Louisiana's claim is groundless. The alleged agreement is evidenced by internal memoranda, labeled "tentative" and "unofficial", generated by both parties and by a history of regulation consistent with the terms of this alleged agreement. The district court correctly found that the documents do not create legally enforceable rights either against the federal defendants, because they were never officially adopted, or against Samedan, because they were not published pursuant to the Administrative Procedure Act, 5 U.S.C. §552(a)(1)(D) (1977).[16] We

affirm the summary judgment against Louisiana's claim on the policy agreement.

III. The Correlative Rights Claim

Louisiana contends that Samedan's well spacing and production practices constitute waste and that this activity, along with Samedan's drainage of state resources, violates Louisiana's correlative rights. The state bases its correlative rights claim against Samedan on Louisiana and federal law. Under the OCSLA, Louisiana asserts, the Secretary has a duty to protect correlative rights threatened by its lessees and to unitize federal and state tracts where a violation exists.

Federal law determines our disposition of this issue, rendering the state's claim under Louisiana law groundless. 43 U.S.C. §1333(a)(1)(2); see Rodrigue v. Aetna Casualty and Surety Co., 395 U.S.

352, 356-57, 89 S.Ct. 1835, 1837-38, 23 L.Ed.2d 360 (1969). Section 1334(a) of the OCSLA provides that the Secretary shall prescribe certain rules and regulations and that

> [t]he Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein. . . .

Correlative rights "means the right of each lessee to be afforded an equal opportunity to explore for, develop, and produce, without waste, oil or gas, or both, from a common source." 30 C.F.R. 250.2(i) (1986). The definition of correlative rights excludes claims for drainage losses and is consistent with the rule of capture. Therefore, Louisiana's third cause of action is limited to an assertion that Samedan is committing waste

which the federal defendants have an obligation to prevent through unitization.

The Director of the MMS is authorized to administer the rules and regulations promulgated by the Secretary. 30 C.F.R. 250.1 (1986). The Director has a duty to prevent waste of natural resources by federal lessees. 30 C.F.R. 250.11(a)(1) (1986).[17] This duty does not require the Director to unitize to prevent waste;[18] the unitization regulations are cast in permissive language. 30 C.F.R. 250.51-1, 2 (1986). Other means of preventing waste are available.[19]

The regulations define waste as:

> (1) The physical waste of oil and gas; (2) the inefficient, excessive, or improper use of, or the unnecessary dissipation of, reservoir energy; (3) the locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations or which causes

> or tends to cause unnecessary or excessive surface loss or destruction of oil or gas; and (4) the inefficient storage of oil.

30 C.F.R. 250.2(qq) (1986). Louisiana contends that Samedan's well spacing and production practices tend to cause reduction in the quantity of gas ultimately recoverable.

Assuming that Louisiana or the state lessees would have a cause of action against the Director or Samedan because of waste, this record raises no issue to support such a claim. The closest Louisiana got to this issue was expert testimony given during the hearing on the state's motion for a preliminary injunction that coordinated exploration might enhance the amount of hydrocarbons ultimately recovered. Against that suggestion was detailed proof by Samedan of prudent operations in accord with federal regulations and under substantial

oversight by the MMS. We find no evidence of waste in the record and affirm the summary judgment.

The district court's judgment is AFFIRMED.

FOOTNOTES

1 Mineral Management Service's regulations define the terms "unit agreement" and "unitization." 30 C.F.R. 250.2(hhh) (1986) states:

> "Unit agreement" means an agreement providing for the exploration for and development and production of minerals from OCS submerged lands as a single consolidated entity without regard to separate ownerships and for the allocation of costs and benefits on a basis defined in the agreement.

30 C.F.R. 250.2(jjj) (1986) states:

> "Unitization" means the combining or consolidation of separately owned lease interests for the joint exploration or development of a reservoir or potential hydrocarbon accumulation under the terms of a unit agreement.

2 We do not address the district court's reasoning in granting the relabeled 12(b)(6) motion because we fully affirm the summary judgment.

3 The author of the Preamble to the unitization regulations, 30 C.F.R. § 250.50, stated that "[a] lease does not grant lessees the ownership of minerals in place, and the Law of Capture applies to the development and production of OCS minerals." 45 Fed.Reg. 29,281, May 2, 1980.

4 43 U.S.C. § 1337(g) (1978) specified that:

(g) Leasing of lands within three miles of seaward boundaries of coastal States

(1) At the time of soliciting nominations for the leasing of lands within three miles of the seaward boundary of any coastal State, the Secretary shall provide the Governor of such State--

(A) an identification and schedule of the areas and regions proposed to be offered for leasing;

(B) all information concerning the geographical, geological, and ecological characteristics of such regions;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) an identification of any field, geological structure, or trap located within three miles of the seaward boundary of such coastal State.

(2) After receipt of nominations for any area of the outer Continental Shelf within three miles of the seaward boundary of any coastal State, the Secretary shall inform the Governor of such coastal State of any such area which the Secretary believes should be given further consideration for leasing. The Secretary, in consultation with the Governor of the coastal State, shall then, determine whether any such area may contain one or more oil or gas pools or fields underlying both the outer Continental

Shelf and lands subject to the jurisdiction of such State. If, with respect to such area, the Secretary selects a tract or tracts which may contain one or more oil or gas pools or fields underlying both the outer Continental Shelf and lands subject to the jurisdiction of such State, the Secretary shall offer the Governor of such coastal State the opportunity to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the State and Federal Government.

(3) Within ninety days after the offer by the Secretary pursuant to paragraph (2) of this subsection, the Governor shall elect whether to enter into such agreement and shall notify the Secretary of his decision. If the Governor accepts the offer, the terms of any lease issued shall be consistent with the provisions of this subchapter, with applicable regulations, and, to the maximum extent practicable, with the applicable laws of the coastal State. If the Governor declines the offer, or if the parties cannot agree to terms concerning the diposition of revenues from such lease (by the time the Secretary determines to offer the area for lease), the Secretary may nevertheless proceed with the leasing of the area.

(4) Notwithstanding any other provision of this subchapter, the Secretary shall deposit in a separate account in the Treasury of the United States all bonuses, royalties, and other revenues attributable to oil and

gas pools underlying both the outer Continental Shelf and submerged lands subject to the jurisdiction of any coastal State until such time as the Secretary and the Governor of such coastal State agree on, or if the Secretary and the Governor of such coastal State cannot agree, as a district court of the United States determines, the fair and equitable disposition of such revenues and any interest which has accrued and the proper rate of payments to be deposited in the treasuries of the Federal Government and such coastal State.

5 The legislative history to the 1978 amendments reveals that Section 8(g) was

> intended to establish a procedure for the orderly and efficient leasing and development of Federal Outer Continental Shelf lands contiguous with state tidelands. While the issue of jurisdiction over offshore lands has been resolved by the U.S. Supreme Court in United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975), the problem of drainage of state resources by a lessee operating on the Outer Continental Shelf has not been so resolved.

H.R.Rep. No. 590, 95th Cong., 1st Sess. 144 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News at 1550.

6 State of Louisiana v. Watt, 631 F.Supp. 648 (E.D.La.1985), 5th Cir.

No. 85-3140; State of Texas v. Secretary of the Interior, 5th Cir. No. 84-2422; State of Alaska v. United States, C.A. A-85-502 (D.Ark.), dismissed by stipulation on July 31, 1986.

7 Section 8004(b)(2) provides:

> The acceptance of any payment by a State under this section shall satisfy and release any and all claims of such State against the United States arising under, or related to, section 8(g) of the Outer Continental Shelf Lands Act, as it was in effect prior to the date of enactment of this Act and shall vest in such State the right to receive payments as set forth in this section.

8 43 U.S.C. §1337(g)(2)-(4) (1978).

9 43 U.S.C. §1337(g)(2) (1986) provides that:

> (2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is the

subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

[10] The full text of amended §1332(4)(B) reads:

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section

1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources.

11 43 U.S.C. §1337(g)(3) (1986) provides:

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

[12] Senator Heflin noted that:

> This proposal, while certainly not perfect, will finally settle the allocation issue in a fair and equitable way. By adopting the Committee proposal, further litigation can be avoided and a workable framework can be established for the future allocation of 8(g) revenues.

131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985).

> Senator McClure repeated this intention: While the committee could have simply allocated the present amount of revenues in the 8(g) account once we had determined exactly how much should be in there, that would not have resolved the litigation. The result would have been that we would have to go through this same procedure again in 3 years. We decided that would not be a responsible recommendation. If the Senate desires that this issue be resolved, then it should be resolved with finality.
>
> The [Committee] recommendation does just that. It defines the account and provides a clear and unambiguous allocation of future revenues.

131 Cong.Rec.S15,438-39 (daily ed. Nov. 14, 1985).

[13] 43 U.S.C. §1337(g)(3) reads, in pertinent part:

> Whenever the Secretary . . . determines that [a common reservoir]

may underlie the Federal and State boundary, the Secretary . . . shall notify the other party . . . and the Secretary shall provide . . . notice of the . . . status of the tract. . . .[emphasis added]

14 If the Secretary has leased or intends to lease such tract . . . the Secretary . . . may enter into an agreement to divide [production revenues] by unitization or other royalty sharing agreement, pursuant to existing law.

Id. (emphasis added).

15 See 131 Cong.Rec.S15,425 (daily ed. Nov. 14, 1985) (remarks of Senator Johnston). During the development of new section 8(g)(3) the House Interior and Insular Affairs Committee received a proposal from the state of Alaska which would have expressly enabled states to compel the Secretary to unitize common reservoirs. No Representative or Senator offered this draft as a bill or amendment to a bill.

16 This section specifies that:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applica-

bility formulated and adopted by the agency; and

* * * * * *

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

17 This rule provides:

(a) The Director, in accordance with the regulations in this part, shall:

(1) Regulate all operations conducted under a lease or permit and shall issue and amend OCS Orders and other orders and field rules as may be necessary and proper in order to supervise operations and to prevent harm or damage to, or waste of, any natural resource (including any mineral deposits in areas leased or not leased), any life (including fish and other aquatic life), property, or the marine, coastal, or human environment.

18 The author of the Preamble to the unitization regulations stated that "(g)enerally, unitization will not be authorized solely to protect correlative rights." 45 Fed.Reg. 29,281 (May 2, 1980).

[19] See, for example, 30 C.F.R. 250.17 (1986), which authorizes the Director to approve well spacing to protect correlative rights.

APPENDIX B

TEXT OF ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING THE SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4106

STATE OF LOUISIANA ex rel,
WILLIAM J. GUSTE, JR., Attorney General

Plaintiff-Appellant,

and

CASHCO OIL CO., ET AL.,

Intervenors-Appellants,

versus

UNITED STATES OF AMERICA,
ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11-25-87, 5 Cir., 198_,
_____ F.2d ____)

(December 23, 1987)

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

(Thomas M. Reavley)
United States Circuit Judge

APPENDIX C

JUDGMENT AND TEXT OF OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

STATE OF LOUISIANA, EX REL
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL

VS. CIVIL ACTION NO. 86-0924 "L"

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR; THE
DIRECTOR OF THE MINERALS MANAGEMENT
SERVICE; AND SAMEDAN OIL CORPORATION

J U D G M E N T

For the written reasons assigned in the ruling of this date,

IT IS ORDERED that:

1. The motion of defendant Samedan Oil Corp. to strike exhibits is DENIED.

2. The motion for partial summary judgment filed by defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service is GRANTED.

3. The motion for summary judgment filed by defendant Samedan Oil Corp. is GRANTED.

4. The motion of defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service to dismiss for lack of subject matter jurisdiction is construed as a motion to dismiss for failure to state a claim, and is hereby GRANTED.

5. The motion of the plaintiffs, the State of Louisiana, Cashco Oil Co., Seneca Resources Corp., and Pelto Oil Co., to permit disclosure of protected materials to MFG Corporation is DENIED.

6. All other motions are MOOT.

7. This action is DISMISSED WITH PREJUDICE to all rights of plaintiff and plaintiff-intervenors.

Lafayette, Louisiana, December 19, 1986.

(John M. Duhe', Jr.)
JUDGE, U. S. DISTRICT COURT

(Judgment Entered December 22, 1986)

STATE OF LOUISIANA, ex rel.
William J. GUSTE, Jr.,
Attorney General,

v.

The UNITED STATES of America; the Secretary of the Interior; the Director of the Minerals Management Service; and Samedan Oil Corporation

Civ. A. No. 86-0924 "L".

United States District Court,
W.D. Louisiana,
Lafayette-Opelousas Division.

Dec. 19, 1986.

William J. Guste, Jr., Atty. Gen., Gary L. Keyser and Mary Ellen Leeper, Asst. Attys. Gen., Baton Rouge, La., for plaintiff.

Lawrence Moon, Asst. U.S. Atty., Lafayette, La., for USA and Director of the Mineral Management Service.

Lawrence E. Donohoe, Robert K. Reeves, Randall C. Songy, Patrick G. Tracey, Jr. and R. Thomas Jordan, Jr., Onebane, Donohoe, Bernard, Torian, Diaz,

McNamara & Abell, Lafayette, La., for Samedan Oil Corp.

Charles W. Findlay, Lisa Hemmer and Poe Legette, U.S. Dept. of Justice, Washington, D.C., for Land and Natural Resources Div.

George W. Hardy, III, Michael R. Mangham and Louis R. Davis, Broadhurst, Brook, Mangham & Hardy, Lafayette, La., for Cashco Oil Co.

L. Todd Gremillion, Dotson, Babcock & Scofield, Houston, Tex., and Andrew L. Gates, III, Dotson, Babcock & Scofield, Lafayette, La., for Seneca Resources Corp.

B.J. Duplantis, Gordon, Arata, McCollam, Stuart & Duplantis, Lafayette, La., for Pelto Oil Co.

OPINION

DUHE, District Judge.

A celebrated observer of American government once wrote "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." de Tocqueville, Democracy In America 280 (1956 ed.). The validity of that comment, penned more that one hundred and fifty years ago, is demonstrated by this case. This Court is called upon to resolve a suit brought by the State of Louisiana against the United States, the Secretary of the Interior, the Director of the Minerals Management Service (collectively "Federal Defendants"), and Samedan Oil Corporation ("Samedan"). The dispute concerns the depletion of an allegedly common hydrocarbon pool, underlying both state and federal submerged lands. De-

spite the attention of Congress and both Executives, this issue - involving the allocation of potentially billions of dollars of resource generated revenues - now rests before this court on a motion for summary judgment.

Finding no issue of material fact, I am prepared to rule on the outstanding substantive issues. For the reasons outlined below, I hold that monies paid to Louisiana under the 1986 amendments to §8(g) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1331 _et seq._,[1] are intended to compensate the state for federal drainage of common hydrocarbon reservoirs. Accordingly, the Secretary of the Interior has no duty under §8(g) to enter into a unitization or royalty sharing agreement to compensate states for drainage losses.[2] I find that Louisiana's

acceptance of funds under §8(g) forecloses any claim for drainage losses.

I further rule that an alleged 1975 policy agreement between the sovereigns provides no basis for this action. Additionally, I find no basis in the doctrine of correlative rights to enjoin Samedan's production of hydrocarbons.

This holding terminates the litigation in this Court. Accordingly, the outstanding nondispositive motions are moot, except for the motion of plaintiff, the State of Louisiana, and plaintiffs-intervenors, Cashco Oil Company ("Cashco"), Seneca Resources Corporation ("Seneca"), and Pelto Oil Company ("Pelto") to permit disclosure of protected materials to MGF Corporation ("MGF"). That motion is denied.

FACTS

West Delta Block 18 is a rectangular tract of ocean approximately fifteen miles east southeast of Grand Isle, Louisiana. This area is divided by a line established by the United States Supreme Court in United States v. State of Louisiana, 422 U.S. 13, 95 S.Ct. 2022, 44 L.Ed.2d 652 (1975). The line was drawn parallel to the Louisiana coastline, three miles off-shore.[3] The Submerged Lands Act of 1953, ch. 65, 67 State. 29 (codified at 43 U.S.C. §1301 et seq.), recognized in Louisiana the power to manage, lease, and develop the seabed inside the decree line. The Secretary of the Interior has authority to manage, lease, and develop areas seaward of the line. 43 U.S.C. §1334(a).[4]

In July, 1983 Samedan acquired a federal lease in West Delta Block 18.

This lease, designated OCS-G-5669, is adjacent to State Lease 10088, held by Cashco, Seneca, and Pelto. Samedan completed three wells on it lease and began producing hydrocarbons. The state's lessees also completed producing wells on their leasehold.

Louisiana and its lessees conducted studies which indicated that the penetrated hydrocarbon reservoirs underlay both state and federal lands. Consequently, the State believed that Samedan's wells, allegedly in a structurally advantageous position, were draining gas from beneath State acreage. The defendants contested this claim. The State calculated that 84% of the total recoverable reserves underlay State lands, and that Samedan's position and production rates would permit the recovery of a disproportionate share of the allegedly common

pool. Additionally, the State contended that Samedan's "excessive production rate" would ultimately decrease the total amount of hydrocarbons recovered.

In April, 1986 the State became aware of Samedan's intent to install compression equipment on its wells to increase production, which would aggravate the migration of hydrocarbons. Accordingly, the State filed this suit seeking declaratory and injunctive relief.

The State and its lessees ask for an injunction to: (1) limit defendant Samedan's rate of production "consistent with that proportion of recoverable [gas] reserved underlying the federal portion of the affected reservoirs," and (2) directing the Secretary of the Department of the Interior or to negotiate with the state to achieve unitization of the affected reservoirs.

Plaintiffs also seek a declaratory judgment that the defendants have violated the following: (1) the OCSLA, in particular, 43 U.S.C. §1337(g) ("§8(g)"), as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986; (2) "an agreed and established policy arising from an informal agreement between the Minerals Management Service ("MMS"), through its predecessor, the United States Geological Survey ("USGS"), and the State of Louisiana, through representatives of the Louisiana State Mineral Board and the Louisiana Department of Conservation; and (3) the correlative rights of the State of Louisiana and its mineral lessees under Louisiana law, allegedly applicable under 43 U.S.C. §1333(a)(2)(A), or alternatively, under applicable federal law.

Federal jurisdiction is predicated on 28 U.S.C. §§1331, 1361, 2201, and 43 U.S.C. §1349(a)(3) and (b)(1).

CURRENT POSTURE

As a preliminary note, the Court finds the existence of a common reservoir to be a disputed issue of fact. However, resolution of that controversy is not material to the disposition of this case.

On May 20, 1986 this Court denied the plaintiffs' motion for a preliminary injunction.[5] Subsequently, the Federal Defendants moved for partial summary judgment on two issues: (1) that payments made pursuant to the 1986 amendments to §8(g) were legislatively intended to compensate Louisiana for drainage claims; and (2) that the parties never entered into a binding agreement concerning regulatory principles.

Samedan, by separate motion, raised the same issues as the Federal Defendants, and additionally sought summary judgment on the plaintiffs' correlative rights claim. This was followed by the Federal Defendants' motion to dismiss drainage claims for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2).

Finally, numerous nondispositive motions were filed, including a motion to strike the plaintiffs' exhibits for failure to comply with Fed.R.Civ.P. 56(e). All outstanding motions were consolidated for oral argument on November 10, 1986.

Federal Defendants' jurisdictional challenge is mislabeled. The basis for dismissal is that Louisiana's acceptance of payment under the 1986 amendments to the OCSLA constitutes a waiver of any damage claim as a matter of law. In accordance with the basic philosophy of the

federal rules, the substance of a 12(b) motion controls over form. 5 Wright & Miller, Federal Practice and Procedure, §1347, n. 99 (1969). Accordingly, we construe this filing as a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6).[6]

LAW AND ANALYSIS

In considering these questions, a preliminary issue was raised by Samedan's motion to strike numerous exhibits attached to the plaintiffs' memorandum in opposition to summary judgment. Samedan does not contest the authenticity of these exhibits, but bases its objection on the plaintiffs' failure to certify the documents as required by Fed.R.Civ.P. 56(e).

In light of the fact that all of the exhibits referred to were produced, authored, or received by one of the defendants, I find the motion to strike to be

meritless. Literal compliance with Rule 56(e) serves no purpose under these circumstances. _Cf. Lawson v. American Motorists Insurance Corporation_, 217 F.2d 724, 726 n. 3 (5th Cir.1954) (idle formality to require immaterial documents to conform to Rule 56(e)). The consideration of these motions incorporated all evidence and arguments advanced by the parties.

I. THE LEGISLATIVE INTENT

This dispute can be distilled to two issues. Did Congress intend compensation under §8(g)(2) of the amended OCSLA to incorporate drainage losses? Did Congress also grant the Secretary of the Interior unbridled discretion to refuse to negotiate a unitization or royalty sharing agreement under §8(g)(3)? The answers must be drawn from both the text and the context of the legislation.

Justice Cardozo described statutory construction as a choice between uncertainties. Burnet v. Guggenheim, 288 U.S. 280, 288, 53 S.Ct. 369, 372, 77 L.Ed. 748 (1933). However, I believe that a disciplined analysis of this legislation leads to a single conclusion. The starting point in my inquiry is the plain meaning of the statutory language. See Blue Chip Stores v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J. concurring). If necessary, a textual interpretation can be measured against legislative history. See American Trucking Associations, Inc. v. I.C.C., 659 F.2d 452, 459 (5th Cir.1981).

In applying these principles of statutory construction to the pronouncements of Congress, I am mindful of the need for caution in reviewing legislative commentary. Id. Undoubtedly, the passage

of the 1986 OCSLA amendments was engendered by different, and perhaps inconsistent, legislative motives. That history does not give the Court license to impose its own policy choice. While we are not confined to the statutory language, we are confined by it, and a presumption exists that the legislature intended the plain meaning of its words. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 543-44 (1947).

The Statute

Section 8(g) of the OCSLA governs federal leasing of submerged lands within three miles of a coastal state's seaward boundary. This area is commonly known as the 8(g) zone. Section 8(g) currently provides for the distribution of twenty-seven percent of the revenue derived from federal leasing activity in the 8(g) zone

to the contiguous state.[7] Section 3 of the CCSLA, the declaration of policy, indicates that this distribution is intended to mitigate adverse economic and environmental effects related to the development of offshore resources.[8]

Section 8(g)(3) outlines notification requirements when either executive determines that a common reservoir may underlie both state and federal tracts. The section goes on to provide for the division of revenues in such a case by agreement incorporating unitization or royalty sharing.[9]

<u>The Arguments</u>

The plaintiffs contend that the mandatory division of revenues under §8(g)(2) is not intended to compensate the states for drainage losses. The argue that the provision of a second revenue sharing mechanism in §8(g)(3), triggered

by a determination that a common pool may exist, would be superfluous if the adverse economic effect described in §3 encompassed drainage losses.

The plaintiffs' position ignores the permissive nature of the revenue sharing authority established in §8(g)(3). Although the notification requirements of §8(g)(3) are cast in mandatory language,[10] the text preceeding the revenue sharing provision is clearly permissive.[11] This language invests the Secretary with discretion to enter into agreements pursuant to §8(g)(3). See generally Knight Newspapers, Inc. v. United States, 395 F.2d 353, 357-58 (6th Cir. 1968).

A characterization of §8(g)(3) as discretionary is consistent with the section's restriction of agreements to those formed "pursuant to existing law". Existing law permits the Secretary to

enter into unitization agreements to protect federal royalty interests and prevent waste of natural resources[12]. It is not unreasonable to interpret §8 (g)(3) as preserving the Secretary's license to enter into voluntary agreements with the states. The Secretary would have discretion to negotiate such an agreement when advantageous to federal interests.

Moreover, a comparison to preamendment §8(g) gives credence to the view that drainage compensation is incorporated in §8(g)(2) scheme. The former version of §8(g), enacted in 1978, provided that the existence of a common reservoir triggered a duty "to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the state and federal government." 43 U.S.C.

§1337(g)(2), amended by §§8002-8004 of the Consolidated Omnibus Budget Reconciliation Act, Pub.L.99-272, 100 Stat. 147, 148 (1986) [hereinafter, "former §8(g)"]. If the parties could not agree on a "fair and equitable" division, the Secretary was empowered to proceed with leasing. However, former §8(g)(4) required that all revenues be retained in a separate account until agreement was reached or the issue resolved by a U.S. District Court.

Because the 1986 amendments preserved the Secretary's express authority to proceed with leasing in the absence of any agreement, the failure to carry the escrow provision over into the current §8(g)(3) indicates that agreement on revenue sharing is now entirely discretionary. This is consistent with the view that the substitution of the 27%-73% split now mandated in §8(g)(2) for the

"fair and equitable" standard was designed to incorporate drainage compensation.

One of the stated policies of the OCSLA is to make the OCS available "for expeditious and orderly development." 43 U.S.C. §1332(3). The legislative history of the 1986 amendments indicates that a major goal of Congress was to avoid protracted litigation over the meaning of "fair and equitable."[13] This purpose is inconsistent with plaintiffs' position concerning the meaning of §8(g)(3). Congressional substitution of the 27%-73% division for the "fair and equitable" standard could not be perceived to avoid litigation if drainage was to be compensated separately.

I recognize that my analysis is predicated on the understanding that the "fair and equitable" standard incorporated drainage losses. Despite plaintiffs'

contrary position, I am confident that the history and interpretation of the OCSLA confirm that reliance. The legislative history of the 1978 OCSLA amendments clearly indicates that former §8(g) was intended to address drainage concerns. The House Report states: "[§8(g)] is intended to establish a procedure for the orderly and efficient leasing and development of Federal [OCS] lands contiguous with state tidelands. While the issue of jurisdiction over offshore lands has been resolved by the U. S. Supreme Court [,]. . . the problem of drainage of state resources by a lessee operating on the [OCS] has not been so resolved." H.R.Rep. No. 590, 95th Cong., 2d Sess. 144 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 1450, 1550.

Further evidence that §8(g) was intended to address drainage from state

lands is found in comments by then Secretary of the Interior Cecil D. Andrus. In recommending the "fair and equitable" division of revenue instead of a proposed joint federal-state leasing of 8(g) acreage, Secretary Andrus observed:

> We favor a provision which gives coastal states fair and equitable compensation for oil and gas which is produced through wells in the federal areas adjacent to them, but <u>which is derived from state lands</u>. We believe, however, that special care must be taken not to undermine the Secretary's fundamental responsibilities under the statute and to be as clear as possible about the process under which the State would seek compensation. Thus, in the substitute section we are providing, the references to "joint leasing" have been removed and <u>its principal purpose, compensation for the resource taken from state lands</u>, more clearly brought into focus.

<u>Id.</u> at 219, 220, 1978 U.S.Code Cong. & Admin.News at 1625 [emphasis added].

Additionally, the cases interpreting "fair and equitable" have indicated that drainage is incorporated under the aegis

of §8(g) compensation. State of Texas v. Secretary of the Interior, 580 F.Supp. 1197, 1199-1200 (E.D.Texas 1984); State of Louisiana v. Watt, No. 79-2965-I(2) (E.D.La. October 3, 1984).

Louisiana now claims that its suit under the former §8(g) did not include a claim for drainage compensation. Accordingly, it argues that the compromise of previous litigation by enactment of the 1986 amendments cannot affect its claim for drainage compensation. I disagree with both contentions.

Although the State's complaint in the previous litigation did not specify a drainage claim, responses to interrogatories clearly indicate that the State contended that drainage was an element of its recovery under §8(g). Louisiana also argued that former §8(g) compensation encompassed drainage losses in an amicus

curiae filing in the appeal of the _State of Texas_ litigation.[14]

Regardless of Louisiana's position, I cannot regard Congress' intent to be defined by the pleadings filed in litigation compromised by the 1986 amendments. This argument would lead to the conclusion that Congress intended a different interpretation for each state which sued under former §8(g).[15] Additionally, Congress undoubtedly intended the 1986 amendments to compromise any potential claims by the four states which did not file suits under former §8(g).[16]

Section 8(g)(3) requires that any proceeds generated under a revenue sharing agreement be subjected to the 27%-73% distribution provision of §8(g)(2). Presumably, the terms of any voluntary §8(g)(3) revenue sharing across the State/Federal boundary would compensate

for drainage losses. Because I interpret the division mandated by §8(g)(2) to incorporate drainage compensation, it might appear that voluntary §8(g)(3) revenue sharing affords the states a double recovery.

However, drainage is only a single element of § 8(g) compensation. <u>See State of Texas</u>, 580 F.Supp. at 1221. It is entirely plausible that Congress simply believed that factoring out drainage from the 27% figure posed too much of an obstacle to the operation of a voluntary revenue sharing scheme.

Through §8(g), Congress evidenced a policy regarding the coastal states' remedy for resource drainage by federal lessees on the OCS. That remedy is limited to participation in §8(g)(2) revenue sharing.

II. THE POLICY AGREEMENT

The plaintiffs allege that a 1975 policy agreement concerning regulatory guidelines now binds the United States. The plaintiffs contend that this agreement is evidenced by internal memoranda generated by both parties and a history of regulation consistent with the terms of the alleged agreement.

The alleged policy agreement involves the creation of a buffer zone along the Supreme Court decree line, the exchange of drilling permits for wells authorized within the zone, and the adoption of well spacing requirements in the zone. Additionally, under the alleged policy agreement the party with the largest share of any unit formed within the zone would have the right to set the unit production rates.

These conditions, established in meetings between the U.S. Geological Survey and the Louisiana Department of Conservation, are outlined in a September 19, 1975 internal State memorandum. Identical conditions are incorporated in two internal federal memoranda prepared in 1980. Samedan's operation in West Delta Block 18 violates these terms.

The plaintiffs seek injunctive relief, mandating federal enforcement of the alleged policy agreement. In particular, the plaintiffs contend that the provision relating to the setting of production rates implicitly incorporates a duty to negotiate unitization agreements in good faith.

The plaintiffs contend that factual disputes concerning both the formation of the policy agreement and MMS adherence to its guidelines make this claim inappro-

priate for summary judgment. I disagree. Fed. R.Civ.P. 56(c) requires disputed factual issues be both genuine and material to defeat a motion for summary judgment. <u>See generally</u> Schwarzer, <u>Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact</u>, 99 F.R.D. 465. The factual dispute raised by the plaintiffs is clearly not material to the disposition of this claim.

A GENUINE DISPUTE?

The documents offered by the plaintiff do not indicate the existence of any binding MMS policy. The State's September, 1975 memorandum is entitled "preliminary" and characterizes the outlined regulatory conditions as "tentative possible solutions." The U.S. Government memoranda dealing with this subject term the scheme as "unofficial." The plain-

tiffs advance no other evidence, but assert that at trial they will develop proof of a mutual course of conduct consistent with the conditions of the alleged agreement.

The defendants point out that the plaintiffs have not offered any direct evidence of MMS implementation of the regulatory conditions outlined in the 1975 memorandum.[17] The plaintiffs concede that these terms have never been promulgated by the MMS as published rulemaking.

It is clear that effective use of Rule 56 requires us to refrain from defining factual issues by speculation. Schwarzer, 99 F.R.D. at 466. Yet Fontenot v. Upjohn Co., 780 F.2d 1190, 1192 (5th Cir.1986), teaches that inferential evidence can suffice to defeat a motion for summary judgment.

The plaintiff's evidence only marginally raises a factual dispute concerning the existence of an MMS policy as defined in the 1975 memorandum. However, courts ordinarily indulge in presumptions favorable to a nonmovant. Securities and Exchange Commission v. Spence & Green Chemical Company, 612 F.2d 896, 900 (5th Cir.1980). Accordingly, I will assume that a genuine factual dispute exists.

A MATERIAL ISSUE?

To preclude summary judgment, a genuine factual dispute must involve a controlling issue. Anderson v. Liberty Lobby, Inc., --U.S.--, 106 S.Ct. 2505, 2510, 91L.Ed.2d 202(1986). In this case, the factual dispute concerns MMS adoption of the alleged policy agreement. However, I find that proof of a history of consistent regulation cannot entitle the plaintiffs to prevail.

Clearly, the conditions of the 1975 memorandum are designed to "implement, interpret, or prescribe law or policy." See Batterton v. Marshall, 648 F.2d 694, 700 (D.C.Cir.1980). The authority to promulgate rules consistent with those outlined in the policy agreement was delegated to the Secretary in §5 of the OCSLA, 43 U.S.C. §1334. Thus, MMS adoption of the terms of the 1975 memorandum would constitute rulemaking under the aegis of the Administrative Procedures Act ("APA"), 5 U.S.C. §§551 et seq.[18]

However, even if the MMS conceded the 1975 memorandum to accurately reflect its regulatory intentions, those conditions could not be enforced against Samedan. The APA requires agencies to publish certain regulations and guidelines as a prerequisite to enforcement. Agencies must publish in the Federal

Register "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. §552(a)(1)(D).

The conditions outlined in the 1975 memorandum constitute the substance of a regulation imposing specific obligations upon private interests in mandatory terms. As such, these requirements must be either published in the Federal Register or reasonably available and incorporated by reference. See Appalachian Power Company v. Train, 566 F.2d 451, 455 (4th Cir.1977). The terms of the 1975 memorandum have never been so published.

5 U.S.C. §552(a)(1) provides that "a person may not in any manner. . . be adversely affected by a matter required to be published in the Federal Register and

not so published."[19] MMS adherence to the terms of the 1975 memorandum would adversely affect Samedan's West Delta operations. Accordingly, the MMS could not invoke the terms of the unpublished policy in regulating Samedan's operations.

Material factual issues are those which entitle a nonmovant to prevail if favorably resolved. Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408, 410 (5th Cir.1982). As outlined above, proof of a course of conduct consistent with the terms of the alleged 1975 policy agreement could not support a verdict for plaintiff. Accordingly, summary judgment is appropriate.

III. THE CORRELATIVE RIGHTS CLAIM

The plaintiffs allege that the drilling and production of Samedan's wells has deprived the plaintiffs of a reasonable opportunity to recover an equitable

share of the potentially common pool. The plaintiffs contend that Louisiana law, or alternatively, federal common law, entitles them to an injunction limiting Samedan's production.

The Applicable Law

I find that federal law defines Samedan's production rights on the federal OCS.

The OCSLA extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the OCS. 43 U.S.C. §1333(a)(1). To fill the substantial gaps in the coverage of federal law, the OCSLA provides for the adoption of laws of a state adjacent to the Federal OCS "[t]o the extent that they are applicable and not inconsistent with. . . other Federal laws and regulations of the Secretary" as surrogate federal law. 43 U.S.C.

§1333(a)(2). See Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, 356-57, 89 S.Ct. 1835, 1837-38, 23 L.Ed.2d 360 (1969). State law is only introduced to the OCS in the absence of relevant Federal law. Id. at 357-58, 89 S.Ct. at 1838; Continental Oil Co. v. London Steam-Ship Owners Mutual Insurance Ass'n., 417 F.2d 1030, 1036 (5th Cir.1969).

Congress has provided controlling federal law in this context. The 1986 amendments to the OCSLA address drainage claims across the state and federal boundary line. Additionally, the OCSLA delegates the power to prescribe rules pertaining to OCS production to the Secretary of the Interior. 43 U.S.C. §1334(a). This power includes a mandate "to provide for the prevention of waste and conservation of the natural resources of the [OCS], and the protection of

correlative rights therein[.]" Id. Pursuant to this delegation, the Secretary promulgated regulations vesting power to control production rates and well spacing in the Director of the MMS. See supra note 17. As described above, the Director exercises his authority through the issuance of individual OCS Orders targeting specific areas and operations.

This pervasive federal regulatory scheme displaces state law relative to correlative rights on the federal OCS.

Applying Federal Law

The Secretary has defined "correlative rights" as the right of adjacent lessees to be afforded an equal opportunity to explore for, develop, and produce hydrocarbons without waste. 30 C.F.R. §250.2(i). "Waste" is defined as the physical waste of hydrocarbons, the dissipation of reservoir energy, and the

reduction of the amount of ultimately recoverable hydrocarbons. 30 C.F.R. §250.2(qq). Notably, economic lossess [sic] inherent in the cost of drilling wells to exploit a common pool are excluded from this definition.

Federal law embodies the "rule of capture," as tempered by restrictions on waste. To prevail on a correlative rights claim, the plaintiffs need demonstrate waste. This can be accomplished by proving either actual waste by Samedan or the plaintiffs' inability to produce from a common pool without improperly dissipating reservoir energy. To preclude summary judgment, the plaintiffs need raise a genuine issue of material fact concerning this controlling issue. Anderson, 106 S.Ct. at 2510.

The plaintiffs have made no showing that Samedan's operations denied the

state's lessees an equal opportunity to produce hydrocarbons in West Delta Block 18. The plaintiffs' contentions concerning the cost of drilling additional wells to recover a ratable portion of the reservoir are immaterial. The doctrine of correlative rights simply does not incorporate these expenses as "waste." This action is founded solely on proof of intentional or negligent waste of hydrocarbons or reservoir energy.

This Court denied a motion for a preliminary injunction in this case, characterizing the plaintiffs' evidence concerning waste as speculative. The nature of that evidence is unchanged. At issue now is whether the plaintiffs' evidence is sufficient to create a genuine factual issue.

When evidence presented in a motion is subject to conflicting interpretations,

summary judgment is ordinarily improper. See Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 526 (5th Cir.1960). However, the evidence advanced must be substantial. Fireman's Mutual Insurance Co. v. Aponaug Mfg. Co., 149 F.2d 359, 362 (5th Cir.1945); 10A Wright, Miller & Kane, Federal Practice and Procedure §2725 n.31 (1983). A nonmovant is not entitled to hold back his evidence until trial. See Bruce Construction Corp. v. United States for use of Westinghouse Electric Supply Co., 242 F.2d 873, 874-75 (5th Cir.1957). The amount of evidence necessary to raise a genuine issue of fact is enough "to require a jury or judge to resolve the parties' differing versions at trial." First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

There is absolutely no evidence that Samedan's operations are themselves wasteful. However, the plaintiffs' experts testified that the coordinated exploitation of the allegedly common reservoir _might_ enhance the amount of hydrocarbons ultimately recovered. This ambiguous evidence is hardly substantial, and could not conceivably carry the plaintiffs' burden of proving their case by a preponderance of the evidence.

This Court has weighed a number of factors in evaluating this motion. These factors include the value of additional examination of the plaintiffs' witnesses, and the benefit of further developing a factual issue at trial. Considering the full record and the foregoing legal principles, I find summary judgment to be appropriate on this issue.

IV. THE MOTION TO PERMIT LIMITED DISCLOSURE OF PROTECTED MATERIALS

MGF Oil Corporation and MGF 82 Ltd. (collectively "MGF") are current record interest owners in several state leases in West Delta Block 18. MGF obtained this interest by virtue of a 1982 assignment from Cashco. MGF is not a party to this suit.

In May, 1986 this Court issued a stipulated protective order pursuant to Fed. R.Civ.P. 26(c). The order protects confidential research and commercial information obtained in the discovery process from disclosure. Paragraph 2 of the order details persons entitled to receive confidential information. These include the parties, counsel, and employees and witnesses as necessary to prepare for trial. Paragraph 2(e)

provides for disclosure to "[a]ny person designed [sic] by the Court in the interest of justice, upon the motion of any party and upon such terms as the Court may deem proper[.]" Persons receiving information subject to the protective order are required to execute a written assurance consenting to the Court's *in personam* jurisdiction.

Subsequently, the Louisiana Office of Conservation scheduled a public hearing to develop factual testimony concerning drainage and waste in West Delta Block 18. The State contended that this hearing was necessary to permit the Commissioner of Conservation's technical staff to make formal findings. The defendants expressed concern that a public hearing would result in the unauthorized disclosure of protected information. In compromise, the parties stipulated that a closed hearing

would be conducted, but that any findings would be accorded the same legal effect in this case as if the hearing had been open. The parties agreed that actual notice of the hearing date was to be afforded all parties determined to have an interest. MGF was a signatory to this stipulation.

MGF was notified of the scheduled hearing, and attempted to attend. Samedan objected to the presence of MGF, although both MGF representatives had executed written assurances in compliance with the protective order. To avoid impeding the progress of the hearing MGF withdrew, reserving its right to receive a transcript of the proceeding through the plaintiffs' motion.

This dispute invokes conflicting rights. Nondisclosure of the hearing transcript to MGF might constitute a due

process violation in that MGF may be bound to any legal effect of the proceedings. However, disclosure of protected materials to MGF, a nonlitigant, is outside the scope of the original order.

In their memorandum supporting this motion, the plaintiffs concede that MGF's execution of the stipulation binds them to the terms of the protective order. The order clearly limits MGF's access to confidential information to that permitted by this Court "in the interests of justice." A review of the terms of the order reveals that its unmistakable intent is to prevent disclosures other than those necessary to prepare the case for trial. MGF has no discernible function in the litigation of this claim. Accordingly, MGF should have been aware that it could not qualify to receive disclosure of protected material under Paragraph 2(e) of

the order. Moreover, I find any intrusion on the due process rights of MGF to be minimal. MGF does not seek any input into the Commissioner of Conservation's determination. It simply seeks release of a transcript of the hearing.

The plaintiffs contend that Samedan's acquiescence to the notice of MGF as an interested party constitutes a waiver of the disclosure limitations of the protective order. In the light of the countervailing considerations, I find this argument less than compelling.

JUDGMENT

For the written reasons assigned in the ruling of this date,

IT IS ORDERED that:

1. The motion of defendant Samedan Oil Corp. to strike exhibits is DENIED.

2. The motion for partial summary judgment filed by defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service is GRANTED.

3. The motion for summary judgment filed by defendant Samedan Oil Corp. is GRANTED.

4. The motion of defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service to dismiss for lack of subject matter jurisdiction is construed as a motion to dismiss for failure to state a claim, and is hereby GRANTED.

5. The motion of the plaintiffs, the State of Louisiana, Cashco Oil Co., Seneca Resources Corp., and Pelto Oil Co., to permit disclosure of pro-

tected materials to MFG [sic] Corporation is DENIED.

6. All other motions are MOOT.

7. This action is DISMISSED WITH PREJUDICE to all rights of plaintiff and plaintiff-intervenors.

FOOTNOTES

1 These amendments are contained in the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-272, §§8002-8004, 100 Stat. 147-51.

2 "Unitization" refers to the consolidation of separately owned lease interests for the joint exploration or development of a hydrocarbon reservoir under the terms of a unit agreement 30 C.F.R. 250.2(jjj) (1986).

3 For a history of the thirty year dispute surrounding the location of the Louisiana coastline, see United States v. State of Louisiana, 446 U.S. 253, 258-59, 100 S.Ct. 1618, 1622-23, 64 L.Ed.2d 196 (1980), reh. den. 447 U.S. 930, 100 S.Ct. 3007, 65 L.Ed.2d 1110 (1980).

4 The Secretary has delegated the authority to manage oil and gas leasing on the federal offshore continental shelf ("OCS") to the Minerals Management Service ("MMS"). 30 C.F.R. 250.1.

5 It found that the plaintiffs alleged two distinct interests: (1) a right to be protected from income lost through the defendants' drainage of hydrocarbons; and (2) a right to be protected against the waste of hydrocarbons by competitive drilling practices. Finding any drainage losses to be compensable with a money judg-

ment, and allegations of waste to be speculative, it declined to enjoin the defendants' production. See Canal Authorities of the State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir.1974) (among prerequisites for preliminary injunction is substantial threat of irreparable harm and substantial probability of prevailing on the merits).

6 Normally, consideration of a 12(b)(6) motion focuses solely on the allegations in the complaint. However, introduction of matters of public record and entertainment of oral argument is permissible. 5 Wright & Miller, Federal Practice and Procedure, §§1357 n. 41 and 1364, n. 24-43.

7 Paragraph (2) of the amended §8(g) provides: Not withstanding any other provision of this Act, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents and royalties, and other revenues. . . derived from any lease issued after September 18, 1978 of any Federal tract which lies. . . within three nautical miles of the seaward boundary of any coastal state[.] Except as provided in paragraph (5) of this subsection,. . . . the Secretary shall transmit to such coastal State 27 percent of these revenues together with all accrued interest thereon.

8 As amended, §3 of the OCSLA, 43 U.S.C. §1332(4)(B) reads: "(B) the distribution of a portion of the

receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g), will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources. . . ."

9 §8(g)(3), 43 U.S.C. §1337(g)(3), as amended, reads: Whenever the Secretary or the Governor of a coastal State determines that a common potentionally hydro-carbon bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydro-carbon bearing area. If the Secretary has lease or intends to lease such tract or tracts, the Secretary and the Governor of the coastal state may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon bearing area by unitization or other royalty sharing agreement pursuant to existing law. If the Secretary and Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of Paragraph (2).

10 43 U.S.C. §1337(g)(3) reads, in pertinent part: "Whenever the Secretary. . . determines that [a common reservoir] may underlie the Federal and State boundary, the Secretary . . . shall provide. . . notice of the. . . status of the tract. . . ." [emphasis added]

11 "If the Secretary has leased or intends to lease such tract. . . the Secretary. . . may enter into an agreement to divide [production revenues] by unitization or other royalty sharing agreement, pursuant to existing law." [emphasis added] Id.

12 Section 5(a) of the OCSLA, 43 U.S.C. §1334(a) authorizes the Secretary to issue rules "for the prevention of waste and conservation of the natural resources of the [OCS], and the protection of correlative rights[.]" Those correlative rights refer both to the respective rights of federal lessees and the protection of federal royalty interests from state encroachment. See 30 C.F.R. 250.50(a). Section 5(a) was unaffected by the 1986 amendments to the OCSLA.

13 No satisfactory division of 8(g) revenues was ever achieved under the "fair and equitable standard, despite lengthy litigation. At the end of fiscal year 1985, $6.1 billion remained in escrow, awaiting resolution of the claims of seven states. H.R.Rep. No. 300, 99th Cong., 2d

Sess. 547 (1985) U.S.Code Cong. & Admin.News 1986, p. 42.

14 Entitled State of Texas v. Hodel, Nos. 84-2422, 85-9072 (5th Cir. 1985), the appeal was dismissed as moot on May 5, 1986 because of the passage of the 1986 amendments. In the corresponding district court action, Civ. A. No. B-79-476-CA (E.D.Tex.), the Court vacated its previously entered judgment and dismissed the case with prejudice on August 11, 1986 pursuant to the stipulation of the parties.

15 Texas, Louisiana, and Alaska sought judicial resolution of the "fair and equitable" standard. Entitled State of Alaska v. United States, et al., C.A. A-85-502 (D.Ak.1985), the Alaska litigation was dismissed on July 31, 1986 pursuant to the stipulation of the parties.

16 California, Alabama, Mississippi, and Florida were also eligible to receive disbursements under the provisions of §8(g).

17 The MMS implements regulation through formal Orders, issued by the Director, which are directed at specific areas and operations. 30 C.F.R. §250.2(ee). See 30 C.F.R. §§250.10 (jurisdiction of director), §250.16 (authority to set production rate), §250.17 (authority to set well spacing), §250.50 (authority to unitize).

18 5 U.S.C. §551(4) defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" This definition includes nearly every statement an agency may make. Batterton, 648 F.2d at 700.

19 The Court is aware that actual and timely notice of an unpublished policy or regulation will bind a party. Timber Access Industries Co., Inc. v. United States, 553 F.2d 1250, 1255 (Cl.Ct. 1977); Nason v. Kennebec County CETA, 646 F.2d 10, 19 (1st Cir. 1981). However, a review of the record reveals no allegation that Samedan was aware of MMS implementation of the terms of the 1975 memorandum as a policy.

APPENDIX D

TEXT OF STATUTORY PROVISIONS

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43 U.S.C. 1337(g)(2) states:

> (2) Notwithstanding any other provision of this Act, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is the subject of an agreement under section 7 of this Act entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the

> percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

43 U.S.C. 1337(g)(3) states:

> (3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary

and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).